# SELECTED GUIDELINE APPLICATION DECISIONS FOR THE EIGHTH CIRCUIT JANUARY 1994-SEPTEMBER 1998

**Prepared by the**
**Office of General Counsel**
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# U.S. SENTENCING COMMISSION GUIDELINES MANUAL
# CASE ANNOTATIONS—EIGHTH CIRCUIT

## CHAPTER ONE: *Introduction and General Application Principles*

### Part B General Application Principles

**§1B1.2** Applicable Guidelines

United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998). The district court properly considered the criminal sexual abuse guideline when departing upward for extreme conduct and injury in the defendant's robbery sentence. Although the applicable guideline was §2B3.1, robbery, the district court properly referred to §2A3.1 (based on the defendant's rape of a restaurant employee during the robbery) in deciding an appropriate level for departure.

**§1B1.10** Retroactivity of Amended Guideline Range (Policy Statement)

United States v. Adams, 104 F.3d 1028 (8th Cir. 1997). The district court erred in revisiting an earlier determination when ruling whether to retroactively apply a relevant amendment. By means of a plea agreement, the defendant stipulated that 73 marijuana plants were attributable to him—government agents found 110 plants at the defendant's property. Subsequent to sentencing, Amendment 516 to USSG §2D1.1(c), which is retroactive pursuant to USSG §1B1.10, changed the weight equivalence of marijuana plants for sentencing purposes from one kilogram to 100 grams. The district court rejected two motions by the defendant for resentencing in light of the amendment stating, in pertinent part, that "[h]ad the defendant been held accountable for the entire one hundred ten marijuana plants the statutorily required minimum term of imprisonment would have been five years pursuant to 21 U.S.C. § 841(b)(1)(B)." The circuit court, on three grounds, agreed with the defendant's claim that this is an impermissible revisitation of a factual finding—the number of plants—in determining the appropriate sentence. First, although not res judicata, it is "unusual" for a trial court to revisit a finding of fact. Second, in approving the plea bargain, the trial court had already assessed that the 73 plants "adequately reflected the seriousness" of the defendant's conduct. Third, in deciding whether to apply an amendment retroactively, §1B1.10(b) implicitly directs the court to "leave previous factual decisions intact." Consequently, it was error for the district court, in examining whether to reduce the defendant's sentence, to take into account the possibility that the defendant may have been accountable for more plants than he had plea bargained to.

United States v. Douglas, 64 F.3d 450 (8th Cir. 1995). The district court erred in refusing to apply an amendment retroactively by holding that the change was substantive rather than clarifying. The Eighth Circuit had previously held that a felon in possession of a firearm conviction constituted a crime of violence within the meaning of the career offender provision of the guidelines. The defendant was originally sentenced to 120 months imprisonment pursuant to this interpretation. Amendment 433, which became effective on November 1, 1991, amended the guidelines commentary to provide that a firearm possession is not a "crime of violence" under USSG §4B1.1

and thus cannot trigger the application of the career offender provision. Amendment 433 also stated that it was a clarifying change rather than a substantive one and was approved by the Sentencing Commission for retroactive use. The Commission also raised the base offense level of the felon in possession guideline such that a firearms offender with the criminal record of this defendant could expect a sentence range partly overlapping that which he had faced under this circuit's erroneous application of the career offender guideline. The defendant moved for a reduction of his sentence, arguing that he should have been sentenced under the pre-November 1991 felon in possession provision, which would yield a sentence of 27- 33 months. Upon resentencing, the district court applied the higher felon in possession guideline and sentenced the defendant to 108 months imprisonment. The circuit court ruled that the defendant is entitled to the retroactive application of the guideline. The circuit court noted that amendments promulgated by the Commission are to be taken at face value unless plainly erroneous or inconsistent with the guidelines provision they explain or amend, citing Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). The government argued that the Amendment's retroactivity provision is a substantive change since its application would result in a sentence of less than three years whereas under the previous application of the current felon in possession guideline, the defendant's sentence range is eight to ten years. The government relied on the Seventh Circuit's ruling in United States v. Lykes, 999 F.2d 1144, 1149 (7th Cir. 1993), for the proposition that the Commission's decision to remove felons in possession from the career offender definition while at the same time stiffening the regular felon in possession guideline was meant to insure consistent punishment for offenders like the defendant both before and after the 1991 amendments. The circuit court noted that no other circuit has followed the Seventh Circuit's approach of refusing to honor Commission retroactivity decisions where those decisions conflict with local precedent. *See* United States v. Garcia-Cruz, 40 F.3d 986, 989-90 (9th Cir. 1994); United States v. Stinson, 30 F.3d 121, 122 (11th Cir. 1994) (on remand from the Supreme Court); United States v. Carter, 981 F.2d 645, 648-49 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1827 (1993). The circuit court vacated the sentence and ruled that the defendant is entitled to be re-sentenced wholly under the Guidelines version employed by the original district court, "but in light of a retroactive amendment clarifying that the court applied the wrong provision of that version."

United States v. Walsh, 26 F.3d 75 (8th Cir. 1994). The district court erred in granting the defendant's motion for reduction of a sentence originally imposed in July 1991 based on a 1992 amendment to USSG §3E1.1, Amendment 459, that provides an additional one-level reduction for acceptance of responsibility in cases where the base offense level is 16 or greater. The circuit court, citing Eighth Circuit precedent and USSG §1B1.10, held that Amendment 459 may not be applied retroactively.

**§1B1.11** Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

United States v. Cooper, 63 F.3d 761 (8th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996). The district court's application of the 1991 version of the sentencing guidelines to offenses the defendant committed prior to their effective date did not violate the Ex Post Facto Clause. The appellate court stated that although the 1991 amendments increased the offense levels for the defendant's three firearm offenses, application of the 1991 guidelines was justified because one of the offenses occurred after the effective date of the 1991 amendments. The appellate court reinstated its original opinion at 35 F.3d 1248 (8th Cir. 1994). The Supreme Court had vacated that original

judgment, and remanded the case for "further consideration in light of California Department of Corrections v. Morales, 115 S. Ct. 1597 (1995)." Upon this consideration, the appellate court held that although the application of the post-November 1, 1991, grouping rules increased Cooper's penalty because his last groupable offense occurred in January 1991, "Cooper had `fair warning' of the total penalty this additional criminal conduct would entail."

## CHAPTER TWO: *Offense Conduct*

### Part A Offenses Against the Person

**§2A3.4** Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

United States v. Crow, 148 F.3d 1048 (8th Cir. 1998). The district court erred in using a base offense level of 16 in sentencing the defendant for abusive sexual contact with a child under the age of 12 within Indian country. Level 16 applies if the defendant used force in the attack. Although the victim testified she did not want the defendant to remove her clothes and that he hurt her, the record lacked evidence regarding the defendant's and victim's relative sizes, whether the victim felt she could not escape, or what she meant when she said the defendant hurt her, that is, whether he hurt her to force her to submit, or whether the sexual contact itself hurt her. The court of appeals remanded for resentencing based on the correct base offense level of 10 under §2A3.4(a)(3).

### Part B Offenses Involving Property

**§2B3.1** Robbery

United States v. Bartulotta, No. 97-2646, 1998 WL 481104 (8th Cir. Aug. 18, 1998). The district court did not err in concluding that mace is a dangerous weapon under USSG §2B3.1(b)(2)(D). A dangerous weapon is one "capable of inflicting death or serious bodily injury." A serious bodily injury involves "extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." USSG §1B1.1. The defendant's victim testified that she developed chemical pneumonia as a result of being sprayed with the mace, that she missed two weeks of work, and had to take steroid injections daily for four months and steroid pills for one year to cleanse the mace from her system. Thus, the governmental establishes that the defendant used mace as a dangerous weapon. The court distinguishes the case from United States v. Harris, 44 F.3d 1206 (3d Cir.), *cert. denied*, 512 U.S. 1088 (1995), in which the Third Circuit had held that mace was not a dangerous weapon. In Harris, there was no victim testimony about any significant effects from the mace spraying.

United States v. McNeely, 20 F.3d 886 (8th Cir.), *cert. denied*, 513 U.S. 860 (1994). The defendant's base offense level was properly enhanced two levels under USSG §2B3.1(b)(1) for robbing a bank and a post office. The circuit court rejected the defendant's argument that the enhancement was unconstitutionally lacking a rational basis, holding that this is a reasonable enhancement because it "reflects both the seriousness of the offense and past practices."

United States v. Tolen, 143 F.3d 1121 (8th Cir. 1998). The district court erred in finding that the defendant made an express threat of death. The evidence that the defendant, whose left hand was hidden from view, demanded that the teller put cash in a bag "and no one will get hurt" did not support a finding that the defendant was asserting that he was armed.

**Part C Offenses Involving Public Officials**

**§2C1.2** Gratuity

United States v. Patel, 32 F.3d 340 (8th Cir. 1994). The defendant was convicted of giving a gratuity to a government official in violation of 18 U.S.C. § 201(c)(1)(A). The district court correctly used the table in §2F1.1, which ordinarily is used to measure the amount of loss caused by a defendant's fraudulent conduct. However, in the context of §2C1.2 it is not used to measure the loss caused by defendant's illegal gratuity but rather the numbers on the table are "borrowed" by §2C1.1 and the only relevant inquiry is the value of the gratuity.

**Part D Offenses Involving Drugs**

**§2D1.1** Unlawful Manufacturing, Importing, Exporting, Trafficking (including Possession with Intent to Commit These Offenses)

United States v. Campbell, No. 97-3974, 1998 WL 452303 (8th Cir. Aug. 6, 1998). The district court erred in attributing to the defendant two kilograms of cocaine sold to a witness's friend. The witness testified only that the defendant had been present at the garage where his friend made the purchase on the day of the purchase. There was no testimony that the defendant was involved in the sale, or even present at the time of the sale.

United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.), *cert. denied*, 513 U.S. 849 (1994). The defendants were convicted of drug trafficking. Defendant Casares-Cardenas challenged the inclusion of drugs found in the possession of his co-conspirators during a vehicle stop which occurred while he was incarcerated. The district court found that, from jail, Casares-Cardenas helped to procure the car in which the narcotics were being transported, and the activities of his co-conspirators were in furtherance of the conspiracy and were known to or reasonably foreseeable by him. The circuit court affirmed, finding that a defendant may be guilty of conspiracy even if he was incarcerated at the time it was effected. *See* United States v. Lee, 886 F.2d 998, 1003 (8th Cir. 1989). Defendant Casares-Cardenas next argued the district court incorrectly increased his sentence for obstruction of justice. The circuit court affirmed based on the district court finding that the defendant perjured himself on the witness stand at trial. Finally, defendant Osorio argues he had only a minor role and challenges the district court's failure to reduce his sentence on this basis. The circuit court affirmed based on the district court's finding that the defendant's role as a "transporter" of narcotics was an integral role in the advancement of the conspiracy.

United States v. Maxwell, 25 F.3d 1389 (8th Cir.), *cert. denied*, 513 U.S. 1031 (1994). The district court did not err in concluding that defendants Maxwell, Davis, and Lewis were responsible for distributing cocaine base. The defendants argued that they should not be accountable for cocaine

base because defendants Maxwell and Majied sometimes distributed the cocaine in a powder form. The circuit court held that the district court did not clearly err in holding the conspirators liable for cocaine base because Maxwell and Majied knew the people to whom they were distributing were converting the powder into cocaine base, and Majied even supplied some of his co-conspirators with directions for converting the powder into cocaine base. Further, Lewis and Davis sold the cocaine in cocaine base form.

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1008 (1997). On the government's cross-appeal, the appellate court held that the district court committed clear error in finding that the government did not prove by a preponderance of the evidence that the drug distributed by the defendant was d- rather than l-methamphetamine. The defendant was sentenced to the statutory mandatory sentence of 120 months imprisonment for distribution of l-methamphetamine, a sentence lower than the guidelines range for such an amount of d-methamphetamine. The circuit court found that the evidence presented by the government did establish that the drugs involved were d-methamphetamine. After commenting upon various aspects of the evidence which convinced the appellate court that the government had sustained the burden of proof by a preponderance, the court vacated the sentence and remanded for resentencing.

United States v. Palacios-Suarez, 149 F.3d 770 (8th Cir. 1998). The defendant was properly sentenced based on the amount of cocaine and amphetamine in his car, despite the defendant's belief that he was transporting only marijuana. The defendant argued that it was not foreseeable to him that the person for whom he was delivering the drugs would have him carry cocaine instead of marijuana, but the court of appeals held that reasonable foreseeability is relevant in sentencing determinations only with respect to the conduct of those with whom a defendant has conspired or jointly acted. The defendant was sentenced based on the drugs in his car, not on drugs in the possession of a co-conspirator.

United States v. Rogers, No. 98-1073, 1998 WL 414468 (8th Cir. July 24, 1998). The district court did not err in applying the firearm enhancement under USSG §2D1.1(b)(1). The defendant argued that the weapon was used like cash, in exchange for drugs, rather than as a weapon. The court of appeals rejected the argument, noting that an analogous issue was addressed by the Supreme Court in Smith v. United States, 508 U.S. 223 (1993), where the Court held that trading a firearm for drugs constituted using a firearm for purposes of 18 U.S.C. § 24(c). Applying the same analysis, the court of appeals held that a drugs-for-guns trade is sufficient to warrant an enhancement under §2D1.1(b)(1).

United States v. Wilson, 49 F.3d 406 (8th Cir.), *cert. denied*, 516 U.S. 945 (1995). The district court did not err in its application of the guidelines by using the plant count to weight conversion estimates of USSG §2D1.1(c) instead of the harvested drug weight to determine the defendant's base offense level. The defendant was involved in a large scale marijuana growing and distribution scheme and was convicted of conspiracy to manufacture and distribute marijuana and aiding and abetting possession with intent to distribute marijuana. The defendant claimed that application of the plant count conversion in his case would "drastically extend the scope of the conversion principle" because the marijuana attributed to him was harvested, shucked, packaged and sold months before law enforcement officials intervened. The circuit court held that where the

evidence demonstrates that "an offender was involved in the planting, cultivation, and harvesting of marijuana plants, the application of the plant count to drug weight conversion of §2D1.1(c) is appropriate."

*Crack — 100:1 Ratio*

United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994), *cert. denied,* 513 U.S. 1098 (1995). The district court did not err in applying USSG §2D1.1 or 21 U.S.C. § 841. The defendants argued that the application of these provisions violated the equal protection clause because of the resulting disparate impact upon African Americans in the prosecution and sentencing of crack offenses. They did not argue that the Commission and Congress had a discriminatory purpose at the time of enacting USSG §2D1.1 and section 841; rather, the defendants averred that the reaffirmation of the statute and the guideline evidenced a discriminatory purpose. The circuit court disagreed and refused to infer a discriminatory purpose in the maintenance of the penalties.

United States v. McMurray, 34 F.3d 1405 (8th Cir. 1994), *cert. denied,* 513 U.S. 1179 (1995). The district court did not err in rejecting the defendant's argument that the 100:1 ratio for cocaine base or "crack" violated the equal protection clause. Furthermore, this ratio is not a factor the Commission failed to consider in drafting the guidelines, and thus a downward departure was not warranted. Lastly, the district court did not err in treating the powder cocaine defendant was convicted of distributing as cocaine base in order to determine his sentence because it is undisputed the defendants sold crack and that this powder cocaine had simply not yet been converted into crack.

*Sentencing Entrapment*

United States v. Hulett, 22 F.3d 779 (8th Cir.), *cert. denied,* 513 U.S. 882 (1994). The district court did not err when it calculated the defendant's sentence based on the amount of cocaine he actually purchased from undercover government agents. The defendant argued that he was entrapped as a matter of law and that the district court should have based his sentence on the amount of cocaine he could have purchased with the same amount of money at the market rate rather than the artificially low price of one-half the market rate used by the government. Under USSG §2D1.1, comment. (n. 17), enacted subsequent to the defendant's sentencing, a court may depart downward if, "in a reverse sting operation, the government sets a price substantially below the market price that leads a defendant to purchase significantly more drugs than his resources would otherwise have allowed him to do." The circuit court found that in this case the defendant was not entrapped and the government did not drive up the sentencing range by setting a price so low that it induced the defendant to buy more cocaine.

## Part F Offenses Involving Fraud or Deceit

### §2F1.1 Fraud and Deceit

United States v. Akbani, No. 98-1824, 1998 WL 417121 (8th Cir. Jul. 27, 1998). The district court did not err in its calculation of the loss caused by the defendant's check-kiting scheme. The calculation was not limited to the amount of the "float" at the time of discovery, as the defendant suggested. The full amount of loss is properly determined when all of the checks in the scheme have been presented for payment, thereby revealing the extent of the overdraft.

United States v. Anderson, 68 F.3d 1050 (8th Cir. 1995). The district court did not err in calculating the amount of loss under USSG §2F1.1. The district court had determined that the intended loss the defendant had attempted to inflict was larger than the actual loss, and used the intended loss as the estimated loss for purposes of determining the defendant's base offense level under USSG §2F1.1. The defendant contended that the court did not make a reasonable estimate of intended loss because he intended no loss to his creditor. The defendant unsuccessfully argued that the court erred by failing to deduct the payments that he intended his creditors to receive in calculating intended loss, and by defining intended loss as potential loss. The circuit court concluded that the district court's calculation of intended loss as the difference between the maximum potential loss based on undisclosed assets and the amount the defendant actually repaid in settlements to creditors who did not know the true extent of his assets was not clearly erroneous. *See* Kok v. United States, 17 F.3d 247, 250 (8th Cir. 1994).

United States v. McCord, Inc., 143 F.3d 1095 (8th Cir. 1998). The district court did not err in enhancing the defendant's fraud sentence for "conscious or reckless risk of serious bodily injury," under USSG §2F1.1(b)(4)(1). The court of appeals noted that some fraudulent schemes involve such obvious risks of serious bodily injury that the criminal recklessness of their perpetrators will be self-evident, such as intentionally causing car accidents to commit insurance fraud. For most frauds, where the risk of bodily injury is less direct or obvious, the government must prove not only that the fraudulent conduct created a risk of serious bodily injury, but also that the defendant was in fact aware of and consciously or recklessly disregarded that risk. In this case, the evidence was sufficient that the defendants knew of the safety risk they created in falsifying truck driver logs to conceal violations of regulations.

United States v. Peters, 59 F.3d 732 (8th Cir. 1995). The district court did not err in its calculation of loss pursuant to USSG §2F1.1. The defendant owned and operated an architectural and engineering firm which was hired to assist a school district in obtaining federal funds for an asbestos removal project. Upon discovering that the funds provided were substantially in excess of what was needed for the asbestos project, the defendant developed and implemented a scheme to submit false claims to the federal government in order to use additional money for other renovation projects in the school district which were unrelated to asbestos removal. The defendant was convicted of various counts of conspiracy to defraud the United States, causing false and fraudulent claims to be filed against the United States and theft of property belonging to the United States. The district court determined the amount of loss to be $153,476—the full amount of the false claims the defendant had submitted. The defendant argued on appeal that because the program was partially a

loan program, the district court should have included the amount that the United States was unlikely to recover instead of the full amount of the claims submitted, pursuant to note 7(b) of the commentary to USSG §2F1.1. The circuit court ruled that even if a portion of the $153,476 could be characterized as a loan, it is still an interest free loan and therefore best characterized as a government benefit. The circuit court noted that the commentary accompanying USSG §2F1.1 specifically provides that the loss is the value of the benefits diverted from intended recipients or uses when the case involves diversion of government program benefits, which in this case was correctly determined to be $153,476 by the district court.

United States v. Shoff, No. 97-3286, 1998 WL 466642 (8th Cir. Aug. 12, 1998). The district court erred in including in the amount of loss an amount identified in the PSR as a loss to an offshore investor who was defrauded. No government witness identified this investor, and the defendant objected to the PSR finding. The government did not introduce any evidence concerning this victim at sentencing. The court of appeals held that a PSR to which the defendant has objected may not be evidence at sentencing. The district court could have relied on other evidence to make its finding, but not on the disputed PSR.

## Part J Offenses Involving the Administration of Justice

### §2J1.6 Failure to Appear by Defendant

United States v. Crow Dog, No. 97-3594, 1998 WL 391505 (8th Cir. July 15, 1998). The district court did not err in treating the defendant's failure to appear conviction separately from his underlying conviction, imposing a separate and consecutive sentence. The defendant argued that the district court should have used the failure to appear as an upward adjustment to the base offense level for his underlying conviction, arson. The court of appeals upheld the district court's approach, holding that, in 18 U.S.C. § 3146(b)(2), Congress specifically provided that, if a sentence is imposed for a failure to appear count, it must be consecutive to the sentence of imprisonment for any other offense. The court held that the statute is thus in conflict with application note 3 to §2J1.6, which suggests determining a total sentence for the underlying offense and the failure to appear and then dividing the sentence among the convictions. A statute requiring imposition of a consecutive sentence is excluded from the grouping rules in §§3D1.2-3D1.5. Thus, §5G1.2(a) governs and requires sentencing courts to determine and impose consecutive sentences independently.

## Part K Offenses Involving Public Safety

### §2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

United States v. Cooper, 63 F.3d 761 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1548 (1996), reinstating opinion at 35 F.3d 1248 (8th Cir. 1994). The district court did not err in failing to find that the November 1, 1991, amendment to §2K2.1 was promulgated in violation of the enabling legislation in 28 U.S.C. § 991(b)(1)(B) and congressional intent. The defendant argued that the amendment was invalid because it violated § 991(b)(1)(B)'s directive that unwarranted sentencing disparities are to be avoided in sentencing defendants with similar records who have been found

guilty of similar criminal conduct. The circuit court rejected this argument, explaining that the existence of some disparity in sentencing between defendants with similar records who commit certain firearms offenses prior to the amendment's effective date and those who commit similar offenses after the effective date does not violate congressional intent. Rather, the enabling legislation contains express directives to the Commission to periodically review and revise the guidelines. The circuit court concluded that reading the legislation in its entirety reveals that Congress authorized and envisioned that such periodic revisions could result in either the increase or decrease of a defendant's sentence. Additionally, the Commission's explanation for why it promulgated the amendment was sufficient to satisfy the requirement in 28 U.S.C. § 994(p) to provide Congress with a statement of reasons for its promulgation.

### Part S Money Laundering and Monetary Transaction Reporting

#### §2S1.1 Laundering of Monetary Instruments

United States v. Hildebrand, No. 97-3021 1998 WL 420504 (8th Cir. Jul. 28, 1998). The district court did not err in basing the offense level for the value of the illegal proceeds laundered on the jury's money laundering forfeiture verdicts against each defendant. The government argued that these determinations understated the value of money laundered by each defendant. The government proposed that the value of money laundered be deemed the same as the loss to the victims of the fraud offenses. The court of appeals rejected this approach: fraud sentences are based on the amount of loss to victims; money laundering sentences are based on the value of money laundered. While both measures address the relative scope of illegal activity, they do not measure the same types of harm. Because the base offense levels for money laundering are much higher than for fraud, it is wrong to assume that the Sentencing Commission intended to equate the amount of fraud loss with the value of money laundering in every fraudulent scheme that includes money laundering (as most frauds do).

The court of appeals held that a sentencing court must separately determine the value of laundered proceeds attributable to each defendant. Complicating this task are 1) the need to distinguish between types of money laundering (reinvestment vs. concealment; and 2) determining what was reasonably foreseeable relevant conduct for each money laundering conspirator. Because fraud and money laundering cannot be grouped for purposes of USSG §2S1.1(b)(2), the government must prove reasonable foreseeability specifically as to the money laundering.

In the absence of this kind of detailed evidence, the trial court's approach was not clearly erroneous.

## CHAPTER THREE: *Adjustments*

### Part A Victim-Related Adjustments

#### §3A1.1 Vulnerable Victim

United States v. Hernandez-Oroyco, No. 98-1256, 1998 WL 459938 (8th Cir. Aug. 10, 1998). The district court did not err in enhancing the defendant's sentence for a vulnerable victim. The defendant was convicted of kidnaping his sister-in-law from a small village in Mexico and

transporting her to Nebraska. She was 15 years old on the day of the kidnaping, had never traveled more than a four-hour drive from her village, and did not speak English, which made her more vulnerable in the United States.

United States v. McDermott, 29 F.3d 404 (8th Cir. 1994). The district court did not err by enhancing the defendants' sentences pursuant to USSG §3B1.1. The defendants were convicted of conspiracy to violate civil rights in violation of 18 U.S.C. § 241 and interfere with a federally protected right in violation of 18 U.S.C. § 245. They argued that the vulnerable victim enhancement was duplicative because African Americans were the typical victims of 18 U.S.C. § 241 crime. The circuit court rejected this argument. *See* United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990), *cert. dismissed*, 112 S. Ct. 353 (1991); United States v. Salyer, 893 F.2d 113 (6th Cir. 1989). Trial evidence established that the victims were racially isolated and were "particularly susceptible to threats of racial violence." The victims' young ages made them particularly vulnerable. The fact that one of the children, determined by the district court to be particularly susceptible because she was in a wheelchair, was white, was of no consequence since the defendants targeted her based on her friendship with the African American children.

**Part B Role in the Offense**

**§3B1.1** Aggravating Role

United States v. Reedy, 30 F.3d 1038 (8th Cir. 1994). The district court did not err in adjusting the defendant's offense level by three levels pursuant to USSG §3B1.1(b). The defendant argued that the enhancement was not applicable because it was based on a finding that he managed the "business" of the conspiracy instead of "one or more participants." He relied on an amendment that became effective after he was sentenced which explained that the adjustment did not apply unless there was a finding that the defendant managed one or more participants. The circuit court concluded that because the district court was required under §1B1.11 to apply the guidelines manual that was in effect at the time of the defendant's sentencing, the amended version of §3B1.3 was inapplicable. Because the Eighth Circuit's pre-amendment interpretation of §3B1.3 encompassed the management of the "business" of the conspiracy, United States v. Grady, 972 F.2d 889 (8th Cir. 1992), the adjustment was correct.

**§3B1.2** Mitigating Role

*See* United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.), *cert. denied*, 513 U.S. 849 (1994), §2D1.1, p. 4.

United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998). The district court erred in concluding that the defendant was ineligible for a minor participant reduction because he was charged with a sole participant possession offense rather than conspiracy to distribute. The defendant presented undisputed evidence that he was not the only participant in the scheme to distribute marijuana and that his role was limited compared with that of others involved. Although the district court stated that he would have recognized that the defendant's participation was minor had he been charged with conspiracy, but because the offense and indictment did not state that the offense was committed in conjunction with others, the court denied the role reduction. The court of

appeals vacated and remanded, holding that USSG §3B1.2 directs consideration of the contours of the underlying scheme, not just of the elements of the offense. The section addresses concerted or group activity, not just conspiracies, and refers to participants, not just defendants. The court concluded that a defendant convicted of a sole participant offense may be eligible for a mitigating role reduction if he can show: (1) that the relevant conduct for which the defendant would otherwise be accountable involved more than one participant and (2) that the defendant's culpability for such conduct was relatively minor compared to that of the other participant(s).

**§3B1.3** Abuse of Position of Trust or Use of Special Skill

United States v. Johns, 15 F.3d 740 (8th Cir. 1994). The district court did not erroneously enhance the defendant's sentence for abuse of a position of trust under USSG §3B1.3. The defendant practiced the spiritual traditions of the Ojibwa Indians, including doctoring ceremonies. He assumed the role of father and spiritual leader of his live-in girlfriend's daughter. For seven years, the defendant sexually abused the daughter, using his position as a spiritual leader to justify time alone with the victim, who was his primary assistant is performing ceremonies, and his role as a parent to justify his abusive behavior. The court of appeals concluded that the abuse of position of trust enhancement was proper based on these facts.

**Part C Obstruction**

**§3C1.1** Obstruction of Justice

*See* United States v. Casares-Cardenas, 14 F.3d 1283 (8th Cir.), *cert. denied*, 513 U.S. 849 (1994), §2D1.1, p. 4.

Hall v. United States, 46 F.3d 855 (8th Cir. 1995). The district court erred in refusing to increase the defendant's sentence for obstruction of justice based on his conduct in allegedly threatening a potential witness at a party held on an Indian reservation. The presentencing report stated, and the defendant denied, that the defendant and his brother had confronted the witness in a bar and told him that if he testified, "they would get him" and "he would be beaten." The district court denied an enhancement for obstruction of justice because "recognizing reservation life in this context for what it is, . . . this type of bar room conversation should [not], when disputed, be elevated to something causing a potential additional 12 months of incarceration." The government contended that the district court erred by failing to find, as required by Fed. R. Crim. P. 32(c)(3)(D), whether a threat occurred. The circuit court agreed, noting that §3C1.1 does not limit the enhancement to particular factual contexts, such as the bar room setting, or make exceptions for social circumstances, such as the realities of reservation life. Accordingly, the circuit court remanded the case to the district court to determine whether the defendant threatened the witness, and if so, to apply the obstruction of justice enhancement.

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996). The district court did not err in refusing to enhance defendant's sentence for obstruction of justice under USSG §3C1.1. The defendant, a fee collection officer for the Badlands National Park Service, was convicted of theft and embezzlement of public monies, based on money taken from fees she had collected. The government asserts that the obstruction of justice enhancement is warranted because the defendant committed

perjury by claiming that she had been robbed and the fees had been taken. Noting that enhancements should not be imposed if a "reasonable trier of fact could find the testimony true," the circuit court found that the district court properly determined that a reasonable jury could have found the defendant's testimony to be true, despite the fact that both the judge and jury did not believe her. The circuit court also noted that the enhancement is proper only when the district court clearly finds both willfulness and materiality as to the alleged perjurious testimony. As the district court did not make these findings, the enhancement was properly denied.

United States v. Moss, 138 F.3d 742 (8th Cir. 1998). The district court did not err in enhancing the defendant's sentence for obstruction of justice after he made a cutthroat gesture toward an adverse witness during a recess at trial.

## Part D Multiple Counts

### §3D1.2 Groups of Closely Related Counts

United States v. O'Kane, No. 97-3020, 1998 WL 568813 (8th Cir. Sept. 9, 1998). The district court erred in grouping the defendant's mail fraud and money laundering counts under §3D1.2(b), which allows grouping for counts involving the same victim and connected by a common criminal objective. The court of appeals held that money laundering is among the so-called "victimless crimes" which harms society's interests, so these counts could not be grouped under this section with the fraud counts, in which defendant's employer was the victim. Nor could the counts be grouped under the loss and value grouping of §3D1.2(d), since this argument was foreclosed by the circuit's decision in United States v. Hildebrand, 1998 WL 420504 (8th Cir. 1998).

## Part E Acceptance of Responsibility

### §3E1.1 Acceptance of Responsibility

United States v. Barris, 46 F.3d 33 (8th Cir. 1995). The district court erred in holding that the insanity defense is inconsistent with acceptance of responsibility as a matter of law. The defendant raised an insanity defense at his trial for threatening to kill the President of the United States in violation of 18 U.S.C. § 871. The insanity defense was rejected by the jury. At sentencing, the defendant requested a two-level reduction for acceptance of responsibility under USSG §3E1.1. The district court held that the insanity defense is inconsistent with acceptance of responsibility. The appellate court held a "defendant who goes to trial on an insanity defense, thus advancing an issue that does not relate to his factual guilt, may nevertheless qualify for an acceptance-of-responsibility reduction under the sentencing guidelines." The circuit court emphasized that USSG §3E1.1, Application Note 2 states that when a defendant goes to trial to assert and preserve issues that do not relate to factual guilt, "a determination that the defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct."

United States v. Chevre, 146 F.3d 622 (8th Cir. 1998). The district court did not err in declining the defendant's request for a reduction for acceptance of responsibility. The defendant's election to argue an entrapment defense shows that he did not accept responsibility for the crime.

*See* United States v. Hipenbecker, 115 F.3d 581 (8th Cir. 1997), §5K2.0, p. 23.

*See* United States v. Walsh, 26 F.3d 75 (8th Cir. 1994), §1B1.10, p. 2.

United States v. Warren, 16 F.3d 247 (8th Cir. 1994). The defendant was convicted for trafficking in cocaine. The circuit court affirmed his sentence, holding that USSG §1B1.1 explicitly prohibits the stacking of downward adjustments for acceptance of responsibility under USSG §3E.1.

## CHAPTER FOUR: *Criminal History and Criminal Livelihood*

### Part A Criminal History

#### §4A1.1 Criminal History Category

United States v. Johnson, 43 F.3d 1211 (8th Cir. 1995). The district court erred in assessing an additional criminal history point pursuant to USSG §4A1.1(c) based upon the defendant's Minnesota conviction for obstructing the legal process. The state court "stayed" the imposition of the sentence for one year, and then dismissed the case. The appellate court reasoned that the "real issue is not whether Johnson's stayed sentence is a `prior sentence,' but rather whether or not it is a `countable' sentence under the Guidelines." The appellate court looked to §4A1.1, comment (n.3) and §4A1.2(c)(1), and held that the prior sentence was countable only if it was one of "probation" for at least one year. Because the sentence had been imposed without an accompanying term of probation, it did not constitute a sentence of probation under §4A1.2(c)(1) and should not have been counted.

#### §4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Lloyd, 43 F.3d 1183 (8th Cir. 1994). The defendant alleged that the district court erred in assessing one criminal history point based on his prior Illinois state misdemeanor conviction. He received a sentence of "conditional discharge" with "18 months inactive supervision" for the offense. The meaning of "probation" in USSG §4A1.1(d) includes a sentence to unsupervised as well as supervised probation. A sentence to "conditional probation" is the functional equivalent of unsupervised probation. The appellate court held that there is no reason why the term probation should be given a different meaning in USSG §4A1.2(c)(1) from that given in USSG §4A1.1. The term "probation" contained in USSG §4A1.2(c)(1) encompasses a sentence of "conditional discharge" as defined in Illinois law.

United States v. Porter, 14 F.3d 18 (8th Cir. 1994). The district court properly included a 1991 state misdemeanor conviction in the calculation of the defendant's criminal history. The defendant claimed that the conviction was constitutionally invalid because he did not knowingly waive his right to counsel. The court concluded that the district court properly relied on United States v. Hewitt, 942 F.2d 1270, 1276 (8th Cir. 1991), which held that a defendant must establish that his prior conviction had previously been ruled constitutionally invalid before it is excluded from the criminal history determination. Since the defendant stated at his state plea hearing

that he read the pre-printed form and that he understood he was waiving his rights, his uncounseled misdemeanor conviction was facially valid and properly used to increase his criminal history score.

**§4A1.3** Adequacy of Criminal History

United States v. McNeil, 90 F.3d 298 (8th Cir.), *cert. denied*, 117 S. Ct. 596 (1996). The district court abused its discretion in departing downward on the basis of overstated criminal history. The abuse of discretion standard set forth in Koon v. United States is consistent with Eighth Circuit precedent that "an abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgement." United States v. Kramer, 827 F.2d 1174, 1179 (8th Cir. 1987). This defendant's criminal history began at age eight when he was caught breaking and entering and continued with three serious encounters with juvenile authorities and at least eight adult convictions ranging from breaking and entering to taking indecent liberties with children and sexual abuse. Despite this history, the court departed downward, basing its decision on the defendant's age when he committed the prior felonies, the circumstances of some of the cases, and the manner in which the cases were handled by the state court. The circuit court found that this departure was a "clear error in judgement" which did not accurately reflect the entire record, including the defendant's recidivist tendency, the fact that the seriousness of his crimes increased with his age, and the fact that incarceration has not deterred him from additional criminal activity.

**Part B Career Offenders and Criminal Livelihood**

**§4B1.1** Career Offender

United States v. Consuegra, 22 F.3d 788 (8th Cir. 1994). The defendant was sentenced as a career offender under USSG §§4B1.1 and 4B1.2 based on two earlier state drug convictions. He challenged his sentence, claiming that the Sentencing Commission exceeded its congressional directive in 28 U.S.C. § 944(h) by including prior state convictions in the definition of career offender under §§4B1.1 and 4B1.2. The defendant argued that Congress only granted authority to include the federal drug crimes listed in the statute. The circuit court upheld the sentence and held that the Sentencing Commission acted within its authority. A "sufficiently reasonable" interpretation of the statute authorizes the definition of career offender to include prior state convictions for conduct that could have been charged under the listed federal statutes.

United States v. Fountain, 83 F.3d 946 (8th Cir.), *cert. denied*, 117 S. Ct. 2412 (1997). On the government's cross-appeal, the Eighth Circuit addressed an issue of first impression in the circuit, and agreed with the Seventh and Tenth Circuits' holdings in United States v. Hernandez, 79 F.3d 584 (7th Cir. 1996), *cert. denied,* 117 S. Ct. 2407 (1997), and United States v. Novey, 78 F.3d 1483 (10th Cir. 1996), that Application Note 2 to USSG §4B1.1 (the Career Offender guideline), as modified by Amendment 506, is inconsistent with the statutory mandate in 28 U.S.C. § 994(h), and is, therefore, invalid. The statute, 28 U.S.C. § 994(h), requires the Sentencing Commission to adopt guidelines that would sentence career offenders "at or near the maximum term authorized." In addition, 21 U.S.C. § 841 requires that certain repeat offenders receive enhanced penalties. Through Amendment 506, the Sentencing Commission defined the term "Offense Statutory Maximum" in

USSG §4B1.1 to mean the statutory maximum prior to any increase in that maximum term under a sentencing enhancement provision. Although noting that the First Circuit, in United States v. LaBonte, 70 F.3d 1396 (1st Cir. 1995) found "relevant statutory maximum" ambiguous enough to defer to the Sentencing Commission's interpretation, the Eighth Circuit concluded that the phrase was not ambiguous. The court reasoned that "[w]here a statute prescribes a range of punishment, the maximum is the upper end of the range. Where a statute provides two tiers of punishment, common sense dictates that the maximum must fall at the high end of the two tiers." In addition, the court noted that the Commission's current interpretation "reduces both section 994(h) and the penalty enhancing components of statutes such as section 841 to mere surplusage." The court acknowledged that, by promulgating Amendment 506, the Commission was attempting to ameliorate the severity of the sentences given to recidivist drug offenders and curb prosecutorial discretion. Nonetheless, the plain meaning of section 994(h) requires the use of the enhanced statutory maximum. As a result, to the extent that any unfairness exists, the situation is for Congress, not the courts to remedy. The Supreme Court's decision in United States v. LaBonte, 117 S. Ct. 1673 (1997), vindicated this Eighth Circuit opinion and cited to it.

**§4B1.2** Definitions of Terms Used in Section 4B1.1

United States v. Baker, 16 F.3d 854 (8th Cir. 1994). The circuit court remanded the case for resentencing, agreeing with the defendant that his conviction of simple possession of crack cocaine in violation of 21 U.S.C. § 856 was not a "controlled substance offense" for purposes of §4B1.2(2), and that the defendant was erroneously sentenced as a career offender under §4B1.1. Although controlled substance offenses under Part 2D of the guidelines include possession offenses, §4B1.2(2) expressly excludes possession offenses. The government did not charge the defendant as an aider or abettor to others using his residence for distribution of controlled substances, and the circuit court decided in the defendant's favor where the jury verdict was ambiguous as to whether the defendant made his home available for distribution or use.

United States v. Hascall, 76 F.3d 902 (8th Cir.), *cert. denied*, 117 S. Ct. 358 (1996). The district court did not err in its determination that the defendant was a career offender pursuant to USSG §4B1.1 and properly labeled his two prior convictions as crimes of violence under USSG §4B1.2. The defendant maintained that USSG §4B1.1 was inapplicable because conspiracy to distribute methamphetamine was not a controlled substance offense under the guidelines. The defendant also argued that the court improperly labeled two prior second-degree burglary convictions as crimes of violence under the third requirement of §4B1.1 because the burglaries involved commercial properties. The appellate court rejected the defendant's challenges, and held that drug conspiracies were included in the career offender provisions of the guidelines thus, the offense satisfied the second requirement of §4B1.1. *See* United States v. Mendoza-Figueroa, 65 F.3d 691, 694 (8th Cir. 1995). Additionally, the appellate court joined the First Circuit in concluding that second-degree burglary of commercial space qualified as a crime of violence under §4B1.2 because a burglary of a commercial space still poses a potential for substantial episodic violence. *See* United States v. Fiore, 983 F.2d 1, 4 (1st Cir. 1992). In contrast, the Tenth Circuit has held that commercial burglary is not a crime of violence because of the narrow scope of the §4B1.2 language which makes specific reference to burglary of a "dwelling," but excludes any reference to unoccupied, commercial structures. *See* United States v. Smith, 10 F.3d 724, 732-33 (10th Cir. 1993).

United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995), *cert. denied*, 516 U.S. 1125 (1996). The district court did not err in treating the defendant's conviction for conspiracy to distribute marijuana as a "controlled substance offense" thereby making him eligible for sentencing as a career offender pursuant to USSG §4B1.1. The defendant pleaded guilty to conspiracy to distribute marijuana and was sentenced to a term of 236 months imprisonment. A divided panel of the Eighth Circuit reversed the district court's ruling, agreeing with the District of Columbia Circuit's ruling in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993), that the Sentencing Commission "exceeded the statutory underpinnings of the career offender provisions" by including drug conspiracy offenses in its definition of offenses that qualify a defendant for the career offender enhancement. United States v. Mendoza-Figueroa, 28 F.3d 766 (8th Cir. 1994). The Eighth Circuit granted rehearing en banc, overruled the panel's decision and affirmed the district court's sentence. The issue on appeal was whether conspiracy to distribute marijuana is a "controlled substance offense." Guideline §4B1.1 provides that an individual is a career offender if the defendant was 18 years old at the time of the instant offense, the crime is a felony that is a controlled substance offense or crime of violence and the defendant has two prior convictions of either a crime of violence or a controlled substance offense. USSG §4B1.2 defines the underlying offense of distribution of marijuana as a controlled substance offense. The conspiracy to commit that controlled substance offense is added to the definition in note one of the commentary to that guideline: "the terms 'crimes of violence' and `controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG §4B1.2, commentary, note one. The circuit court noted the Supreme Court's ruling in Stinson v. United States, 113 S. Ct. 1913 (1993), that interpretive commentary in the guidelines is authoritative unless it violates the Constitution, a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline. *Id*. at 1919. The circuit court further noted that the Commission's extensive authority to author sentencing guidelines includes the discretion to include drug conspiracy offenses in the category of offenses that warrant increased terms for career offenders. The District of Columbia Circuit, however, ruled that since 28 U.S.C. § 994(h) does not include drug conspiracy offenses in its statutory listing of controlled substance offenses for which harsher sentences are mandated, the Sentencing Commission exceeded its authority in including them as qualifying offenses for the career offender provision. The Eighth Circuit ruled that note one must be enforced because it was promulgated within the Commission's full statutory power and is not a plainly erroneous reading of USSG §4B1.2. In addition, the circuit court held that given the interplay between the career offender guideline and the criminal history guidelines, which have a broad anti-recidivist objective, it is unreasonable to conclude that the Commission intended to base USSG §4B1.1 on the limited authority of 28 U.S.C. § 994(h) alone. The circuit court further held that 28 U.S.C. § 994 is ample authority to include drug conspiracies as qualifying offenses and the Commission's correctly interpreted the statute as a broad directive to provide harsh penalties for recidivists, rather than a limited, categorical definition of offenders who warrant recidivist penalties. The Eighth Circuit joined nine circuits in concluding that the District of Columbia Circuit's reasoning in Price is flawed. *See* United States v. Piper, 35 F.3d 611 (1st Cir.), *cert. denied*, 115 S. Ct. 1118 (1995); United States v. Jackson, 60 F.3d 128 (2d Cir. 1995); United States v. Hightower, 25 F.3d 182 (3d Cir.), *cert. denied*, 115 S. Ct. 370 (1994); United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995); United States v. Williams, 53 F.3d 769 (6th Cir. 1995); United States v. Damerville, 27 F.3d 254 (7th Cir.), *cert. denied*, 115 S. Ct. 445 (1994); United States v. Heim, 15 F.3d 830 (9th Cir.), *cert. denied*, 115 S. Ct. 55 (1994); United States v. Allen, 24 F.3d 1180 (10th Cir.), *cert. denied*, 115 S. Ct. 493

(1994); United States v. Weir, 51 F.3d 1031 (11th Cir. 1995). The only other circuit to join the District of Columbia Circuit's ruling is the Fifth Circuit, in United States v. Bellazerius, 24 F.3d 698 (5th Cir.), *cert. denied*, 115 S. Ct. 375 (1994).

## **CHAPTER FIVE:** *Determining the Sentence*

### Part C Imprisonment

**§5C1.2** Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Burke, 91 F.3d 1052 (8th Cir. 1996). The district court did not err in concluding that the defendant was not eligible to be sentenced under the safety valve provision of USSG §5C1.2. To qualify for the safety valve, the defendant cannot possess a firearm or other dangerous weapon "in connection with the offense." 18 U.S.C. § 3553(f)(2). The district court denied the defendant's request for application of the safety valve after finding that he possessed the firearm "in connection with" the drug offense. The defendant argued that there was insufficient evidence to prove he possessed the firearm "in connection with the possession of cocaine conviction. The defendant, however, admitted that his possession of the firearm constituted relevant conduct for purposes of the offense. In addressing an issue of first impression, the appellate court held that the government is not required to show that a firearm was actually used to facilitate a felony offense to deny the "safety valve" provision. The circuit court held that "in connection with" should be interpreted consistently with identical language in USSG §2K2.1(b)(5), which gives a defendant an enhancement if he used or possessed a firearm "in connection with" another felony offense. In United States v. Johnson, 60 F.3d 422, 423 (8th Cir. 1995), the court held that the government was not required to show a firearm was actually used to facilitate a felony offense to support an enhancement under USSG §2K2.1(b)(5). *See also* United States v. Condren, 18 F.3d 1190, 1197 (5th Cir. 1994)(firearm possessed "in connection with" drug felony under USSG §2K2.1(b)(5) when firearm was merely present in location near drugs where it could be used to protect them). Here, the circuit court concluded the defendant " . . . was not eligible for sentencing under the safety valve provision."

United States v. Long, 77 F.3d 1060 (8th Cir.), *cert. denied*, 117 S. Ct. 161 (1996). The circuit court affirmed the district court's determination that the defendant did not meet the requirements of USSG §5C1.2 to be eligible for a sentence below the ten year mandatory minimum sentence because she did not timely provide truthful information to the government. USSG §5C1.2(5). The defendant argued that the district court incorrectly interpreted her prior misstatements to the government regarding the illegal purchase of airline tickets for a coconspirator as part of "the same course of conduct or common scheme or plan" as her crack cocaine trafficking. The defendant also argued that her subsequent truthful statements at the sentencing hearing allowed her to qualify for the reduction in sentence. The circuit court disagreed, and found that the defendant's misstatements to the government were clearly related to the defendant's participation in the crack cocaine conspiracy offense. The defendant's subsequent truthful statements at the time of sentencing did not "cure" the prior misstatements and therefore, she was ineligible for relief under USSG §5C1.2.

## Part D Supervised Release

### §5D1.2 Term of Supervised Release

United States v. Bongiorno, 139 F.3d 640 (8th Cir. 1998). The imposition of a six-year term of supervised release following the defendant's drug conviction was not plainly erroneous. Although it exceeds the three-year supervised release maximum for a Class C felony found in 18 U.S.C. § 3583(b)(2), the term was imposed pursuant to 21 U.S.C. § 841(b)(1)(C), which required a minimum three-year term for the defendant. The supervised release terms of the Anti-Drug Abuse Act of 1986 override those in section 3583.

## Part E Restitution, Fines, Assessments, Forfeitures

### §5E1.2 Restitution, Fines, Assessments, Forfeitures

United States v. Hines, 88 F.3d 661 (8th Cir. 1996). The district court erred in imposing a fine of approximately $300,000 based on the fact that the defendant was to receive $1,550,000 in personal injury payments over the next 35 years. The defendant pleaded guilty to drug and firearm offenses, and challenged on appeal the amount of the fine, arguing that it was excessive and in violation of the Eighth Amendment. He also argued that its terms left his new wife and stepson with no financial support during his incarceration, and that the court overlooked his legal obligation to take care of them. *See* Tyron v. Casey, 416 S.W. 252, 260 (Mo. App. 1967). Because the guidelines make no distinction based on when dependants are acquired, the district court erred in ignoring this mandatory sentencing factor, and the circuit court remanded for further proceedings. In dicta the court further expressed concern that the record did not permit a comparison between the amount of the immediately payable fine and Hine's present ability to pay a fine.

### §5E1.4 Forfeiture

United States v. Bieri, 68 F.3d 232 (8th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996). The circuit court held that forfeiture of the defendants' entire farm is required by 21 USC § 853(a)(2), and the forfeiture is not an excessive fine in violation of the Eighth Amendment. The district court had ordered criminal forfeiture of some of the defendant's property. The government appealed, contending that the district court failed to follow the instruction of the circuit court's prior opinion to forfeit the whole farm. United States v. Bieri, 21 F.3d 819 (8th Cir.), *cert. denied*, 115 S. Ct 208 (1994). The circuit court stated that to determine whether property is forfeitable under 21 U.S.C. § 853(a)(2), the district court's only inquiry is whether the defendant used the property "in any manner or part" to commit or to facilitate a drug trafficking offense. If the property was used for a drug trafficking offense, the forfeiture is mandatory, not discretionary. The district court at sentencing found that the defendants used parts of their farm to facilitate their drug trafficking offense, thus, the district court should have ordered the entire farm forfeitable under section 853(a). The circuit court then noted that the Eighth Amendment prohibits the government from imposing excessive fines under the Excessive Fines Clause. Alexander v. United States, 113 S. Ct. 2766, 2775-76 (1993). The circuit court stated that, "courts must engage in a fact-intensive analysis under the Eighth Amendment Excessive Fines Clause to ensure that the forfeiture is not an excessive penalty, and courts may forfeit less than what the statute requires if necessary `to preserve the

forfeiture by tailoring it to fit within the broad boundaries of constitutional proportionality.'" Bieri, 21 F.3d 819. The circuit court listed a number of factors a district court must consider, including extent and duration of the criminal conduct, gravity of the offense weighed against the severity of the criminal sanction, value of the property forfeited, defendant's motive, and the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct. The circuit court examined a number of factors in concluding that the parent's culpability far outweighed the intangible value of the property, and that the adverse effect of forfeiture on the children does not render the forfeiture unconstitutionally excessive. The circuit court ruled that the district court's decision not to forfeit the farm was not justified by the district court's finding's of fact or by the Eighth Amendment, and reversed the order of the district court.

## Part G Implementing the Total Sentence of Imprisonment

### §5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

United States v. Comstock, No. 97-4399, 1998 WL 557103 (8th Cir. Sept. 3, 1998). It was plain error for the district court to apply the 1995 version of USSG §5G1.3(c), rather than the 1993 version in effect at the time Comstock committed his offenses, when sentencing the defendant who was subject to state sentences for some of the same conduct. Under the 1993 version, the court would have sentenced Comstock as if he were being sentenced on his federal and state convictions at the same time under the guidelines. The court of appeals determined that, because the previous version required that Comstock's federal sentence be at least partially concurrent with his state sentences, sentencing him under the 1995 version meant he would have served 17 more months in prison than under the 1993 guideline. The court vacated and remanded for resentencing.

United States v. French, 46 F.3d 710 (8th Cir. 1995). The district court did not err when it credited the defendant for time served in connection with a state perjury conviction because he was serving "an undischarged term of imprisonment" within the meaning of USSG §5G1.3(b) at the time of his federal sentencing. The appellate court also upheld the district court's finding that the defendant's state court perjury conviction was part of the same relevant conduct as the charged conduct for which the defendant was sentenced. Finally, the appellate court rejected the government's contention that the state perjury conviction should be included in defendant's criminal history calculation.

United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998). The district court did not err in departing downward to give the defendant credit for time served on his expired state sentence for the same conduct. Although the applicable 1987 version of USSG §5G1.3 did not allow for credit in expired sentences, the court of appeals, applying the Koon departure analysis, found that the Sentencing Commission did not prohibit the departure. The court concluded that the expired state sentence was an unmentioned or perhaps an encouraged factor, and the district court thus had authority to depart.

United States v. Marsanico, 61 F.3d 666 (8th Cir. 1995). The circuit court vacated the defendant's sentence because from the record it was unclear what specific factors the district court relied upon when imposing consecutive sentences. The defendant appealed the district court's

decision to run the defendant's sentence consecutively to his undischarged Washington sentence. The circuit court concluded that the district court did not follow USSG §5G1.3(c) which states that the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under USSG §5G1.2 had all of the offenses been federal offenses for which sentences were imposed at the same time. The circuit court noted that a court may depart from the guidelines when sufficient justification exists, but the court must provide specific reasons for departing. The circuit court held that the district court did not provide specific reasons for departing upward, and remanded for resentencing.

United States v. Murphy, 69 F.3d 237 (8th Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996). The district court did not err in its determination that the defendant, who was on parole at the time he committed the federal offense, was serving an undischarged term of imprisonment, thereby triggering USSG §5G1.3(a). The defendant argued on appeal that he should have been sentenced under USSG §5G1.3(c) instead of USSG §5G1.3(a). The circuit court noted that although the district court did not specify which section of USSG §5G1.3 it relied on to sentence the defendant, it was evident from the district court's findings that USSG §5G1.3(a) was applicable to the case. The circuit court recognized that under the Missouri Parole Statute, an "offender on parole remains in the legal custody of the department and subject to the orders of the board." The court further noted that although USSG §5G1.3 has three subsections, the inquiry ends once subsection (a) is applied. The circuit court ruled that the defendant was serving an undischarged term of imprisonment within the meaning of USSG §5G1.3(a) at the time of the federal offense. The circuit court further noted that the phrase in USSG §5G1.3 which discusses work release, furlough or escape status is inclusive and does not diminish the applicability of USSG §5G1.3(a) to parole. The circuit court rejected the defendant's argument that three prior decisions in the Eighth Circuit support his interpretation of USSG §5G1.3. *See* United States v. French, 46 F.3d 710, 717 (8th Cir. 1995); United States v. Haney, 23 F.3d 1413, 1414-16 (8th Cir.), *cert. denied*, 115 S. Ct. 253 (1994), and United States v. Gullickson, 981 F.2d 344, 345-48 (8th Cir. 1992). The circuit court held that its ruling in French was inapplicable because in French, the federal and state charges arose from the same relevant conduct, thereby triggering the application of USSG §5G1.3(b); its decision in Gullickson was not helpful because there was no consideration of whether any other subsection besides USSG §5G1.3(c) was applicable in that case; and its decision in Haney was inapplicable because the case did not raise the issue of whether USSG §5G1.3(c) was applicable.

United States v. Washington, 17 F.3d 230 (8th Cir.), *cert. denied*, 513 U.S. 852 (1994). The defendant was convicted of being a felon in possession of a firearm. He appealed the district court's failure to specify whether his sentence was to be concurrent or consecutive with his undischarged state sentences, one of which was for a robbery relating to this firearms offense. The circuit court remanded the case for clarification in light of the requirements of §5G1.3, and directed the district court to make the sentence concurrent to the related state sentence pursuant to §5G1.3(b) because the district court fully considered the conduct supporting the state sentence when it calculated the offense level for the instant offense. Further, the circuit court directed the district court to determine whether §5G1.3(a) applied to the other state sentence, in which case the instant federal sentence may be consecutive; otherwise §5G1.3(c) requires the sentence to be fashioned so that a reasonable incremental increase in punishment will be achieved.

## Part H Specific Offender Characteristics

**§5H1.1** Age (Policy Statement)

United States v. Goff, 20 F.3d 918 (8th Cir.), *cert. denied*, 513 U.S. 987 (1994). The district court erred in granting a downward departure to the defendant based on the absence of prior convictions, the "relatively minor nature of the offense," the defendant's advanced age, and the defendant's family responsibilities. These factors have already been taken into consideration by the Sentencing Commission in formulating the guidelines and the circuit court determined that in this case none of these factors "whether viewed singly or in combination" were so extraordinary as to warrant a departure. *See* United States v. Simpson, 7 F.3d 913, 819 (8th Cir. 1993).

United States v. Rimel, 21 F.3d 281 (8th Cir.), *cert. denied*, 513 U.S. 1104 (1994). The district court did not err in refusing to depart below the applicable guideline range based on the defendant's age. USSG §5H1.1 permits downward departures when the defendant is "elderly and infirm." In this case there was no evidence that the defendant was infirm.

**§5H1.6** Family Ties and Responsibilities and Community Ties (Policy Statement)

*See* United States v. Goff, 20 F.3d 918 (8th Cir.), *cert. denied*, 513 U.S. 987 (1994), §5H1.1.

## Part K Departures

**§5K1.1** Substantial Assistance to Authorities (Policy Statement)

United States v. Anzalone, 148 F.3d 940 (8th Cir. 1998). The district court erred in denying the defendant's motion to compel the government to move for s substantial assistance departure based a plea agreement. The government based its refusal on information that the defendant had recently possessed and used controlled substances. The court of appeals held that §5K1.1 and 18 U.S.C. § 3553(e) do not give prosecutors a general power to control the length of sentences: the prosecutor's discretion is limited to the substantial assistance issue. Therefore, the government cannot base its §5K1.1 decision on factors other than the substantial assistance provided by the defendant. The government may advise the sentencing court if there are unrelated factors that in the government's view should preclude or severely restrict any downward departure relief. The district court may weigh such alleged conduct in exercising its departure discretion.

United States v. Stockdall, 45 F.3d 1257 (8th Cir. 1995). The district court did not err in finding that the government neither violated the defendants' plea agreements nor exceeded its authority under 18 U.S.C. § 3553(e) by limiting its substantial assistance motions to only one of the defendants' applicable mandatory minimum sentences. The defendants argued that they were entitled to specific performance of their understanding of the plea agreements, in light of the government's failure to advise them that it might limit any section 3553(e) motion it filed. The defendants claimed that they reasonably construed the agreements as requiring that any section 3553(e) motion the government elected to file would apply to all of their mandatory minimum sentences, and that based on the discussion in United States v. De La Fuente, 8 F.3d 1333, 1337-39 (9th Cir. 1993), their reasonable understanding of the plea agreements was controlling. The circuit court rejected this

argument, ruling that the fact that the plea agreements were silent on this issue does not permit a defendant to assume that the government would file an unlimited § 3553(e) motion. Moreover, the circuit court held that the government was permitted to limit its substantial assistance motion because "the plain language of § 3553(e) authorizes the government to make a substantial assistance motion decision for each mandatory minimum sentence to which the defendant is subject." However, the district court erred in allowing the government to limit its substantial assistance motions to only one of the defendants' applicable mandatory minimum sentences based on its interest in reducing the district court's discretion to depart from the government's suggestion of the appropriate total sentences. The circuit court rejected this basis for limiting substantial assistance motions, and cited United States v. Thomas, 930 F.2d 526, 529 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991) in holding that the desire to control the length of a defendant's sentence for reasons other than his or her substantial assistance is an impermissible basis for limiting a substantial assistance motion.

**§5K2.0** Grounds for Departure (Policy Statement)

United States v. Bieri, 21 F.3d 811 (8th Cir. 1993), *cert. denied*, 513 U.S. 878 (1994). The district court's refusal to depart may only be reviewed if there is evidence that the district court believed that it had no authority to depart. *See* United States v. Evidente, 894 F.2d 1000 (8th Cir.), *cert. denied*, 495 U.S. 922 (1990). The district court did not err in refusing to depart because the defendants were the parents of young children. Under USSG §5H1.6, family ties and responsibilities are not relevant in determining whether a departure should be granted unless they are extraordinary and fall outside the "heartland" of cases taken into consideration by the guidelines. United States v. Harrison, 970 F.2d 444, 447 (8th Cir. 1992). The circuit court found this situation to be analogous to Harrison, in which a single parent was incarcerated and the court held that although the impact on the children was detrimental, it did not amount to "extraordinary circumstances outside the heartland of cases considered by the guidelines," and should not be considered. Finally, the defendant mother's first-time offender status did not justify a downward departure based on "aberrant behavior." The structure of the sentencing table accounts for the absence of a criminal record. *See* USSG §5H1.8; *see also* United States v. Simpson, 7 F.3d 813, 819 (8th Cir. 1993) (departure based solely on first time offender status is improper).

United States v. Haversat, 22 F.3d 790 (8th Cir. 1994). The district court erred in departing downward pursuant to USSG §5K2.0 based on the defendant's assistance to the court. The defendant argued that his early plea of nolo contendere and his cooperation in a related civil antitrust lawsuit were proper departure bases because they saved judicial resources. The circuit court disagreed and concluded that a nolo plea and assistance in a civil suit are more appropriately addressed by USSG §3E1.1. *See* United States v. Garlich, 951 F.2d 161 (8th Cir. 1991) (an early guilty plea is a factor to be considered only in the acceptance of responsibility determination). Also, the district court erred in departing downward pursuant to USSG §5K2.0 based on the defendant's good character. Relying on United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990), the defendant argued that the departure was proper because his "outstanding charitable and community service work exhibited his exceptional character to the district court." The circuit court concluded that the defendant's reliance on this case was misguided since the Big Crow analysis does not authorize general good character departures; rather, Big Crow is limited to cases in which the "defendant overcame many substantial obstacles presented by the difficult life of the reservation." Since the defendant did not establish that he overcame any significant hardships, Big Crow was

inapplicable. Although the court noted that charitable or volunteer activities could form a basis for a downward departure, such a departure would only be warranted when the conduct is sufficiently unusual in kind or degree. However, the district court did not err in departing downward based on defendant Gibson's extraordinary family situation, although the degree of the departure was unreasonable. Gibson's wife suffered from severe mental health problems which had been potentially life threatening. Gibson played an irreplaceable part in her treatment, identifying for the doctor any regressions in his wife's behavior and seeking out immediate treatment to avoid a serious situation. The circuit court concluded that the totality of these factors formed a permissible departure basis. However, the guideline for the defendant's antitrust activity, USSG §2R1.1, notes that some confinement should be imposed except in the rarest of cases. USSG §2R1.1, comment. (backg'd). Since Gibson was involved in such a well-planned antitrust conspiracy, which lasted an unusually long time, the district court's departure to only a fine was unreasonable and remand was necessary.

United States v. Hipenbecker, 115 F.3d 581 (8th Cir. 1997). In addressing an issue of first impression, the appellate court affirmed the district court's decision to depart upward under USSG §5K2.0 and to deny the defendant's request for a downward adjustment for acceptance of responsibility under USSG §3E1.1 based on a single act of criminal conduct. The defendant asserted that the district court impermissibly double-counted. The defendant committed embezzlement while she was free on bond pending her federal sentencing. Based on her continued criminal conduct, the district court departed upward two levels under USSG §5K2.0 and declined to grant the request for a two-point reduction under USSG §3E1.1. The circuit court reviewed the decision *de novo* and affirmed, citing with approval the Eleventh Circuit's reasoning in United States v. Aimufua, 935 F.2d 1199 (11th Cir. 1991). The double-counting test is two pronged. It is permissible if 1) the Commission intended the result and 2) each statutory section concerns "conceptually separate notions relating to sentencing." Regarding the first prong, the policy statement for USSG §5K2.0 specifically states that the court may depart for a reason already considered in the guideline "(*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate." Regarding the second prong, USSG §3E1.1's commentary provides that further criminal conduct is an example of conduct that is inconsistent with acceptance of responsibility. This additional criminal conduct can also be considered under Chapter Four for criminal history. "[T]he Commission necessarily contemplated double-counting when it created USSG §3E1.1."

United States v. Kalb, 105 F.3d 426 (8th Cir. 1997). After the district court departed downward pursuant to USSG §5K2.0 for the defendant's "single act of aberrant behavior," the Eighth Circuit reversed and remanded for resentencing. The defendant had begun manufacturing a batch of methamphetamine for Mr. Thomas, but abandoned the project. Two years later, he agreed to ship Thomas six gallons of hydriodic acid, legally obtainable in California where Kalb lived, but not in Iowa where Thomas lived, knowing it would be used to manufacture methamphetamine. When Thomas was arrested two months later, he taped telephone conversations in which he convinced Kalb to enter into a conspiracy to manufacture methamphetamine, promising profits of $50,000. The district court characterized the shipping of precursor chemicals as a single act of aberrant behavior; the court stated that acts in furtherance of the conspiracy did not preclude the departure on this basis since Kalb was reluctant to participate and only agreed after being offered $50,000. The Court of Appeals, applying the Koon v. United States, 116 S. Ct. 2035 (1996), consideration of whether a potential departure factor is prohibited, encouraged, discouraged or

unmentioned by the guidelines, found that, since the guidelines only mentions "single acts of aberrant behavior" in discussing probation and split sentences, it is an encouraged factor only when considering crimes in which the offender might be eligible, with departure, for those forms of punishment. For serious crimes like Kalb's, which cannot warrant probation, a single act of aberrant behavior is an unmentioned departure factor. For unmentioned factors, the sentencing court must "analyze how and why specific conduct is allegedly aberrant, and whether the guidelines adequately take into account aspects of defendant's conduct that are in fact aberrant. . . . Koon instructs the sentencing court to consider the `structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.'" The court of appeals stated that it could not tell from the record what aspects of Kalb's conduct the district court considered "aberrant" and why that particular kind of aberrant behavior falls outside the heartland of the guidelines applicable in determining Kalb's sentencing range. Unless on remand the district court can substantially bolster its reasons for departure as discussed in the opinion, the downward departure is a clear abuse of discretion.

United States v. Maxwell, 25 F.3d 1389 (8th Cir.), *cert. denied*, 513 U.S. 1031 (1994). The district court erred in granting the defendants' request for downward departure based on the 100 to 1 ratio between cocaine powder and cocaine base and its disparate impact on African Americans. Relying on its prior decision in United States v. Lattimore, 974 F.2d 971, 976 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1819 (1993), the circuit court reaffirmed that "while a racially disparate impact may be a serious matter, it is not a matter for the courts, *id.*, and, therefore, [it is] not a basis upon which a court may rely" for departure purposes. The circuit court also noted that downward departures based on racially disparate impact would result in "class-wide downward departures and impede Congress's policy decision to treat cocaine base more harshly than powder cocaine."

*See* United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998), §5G1.3, p. 19.

United States v. Parham, 16 F.3d 844 (8th Cir. 1994). The circuit court remanded for the district court to consider whether grounds existed to support a downward departure. The district court had misperceived its authority, in erroneously stating that it could not depart without a government motion. The government's motion is required only for §5K1.1 departures based upon substantial assistance to the government. Under §5K2.0, the court may depart "if it finds aggravating or mitigating circumstances of a kind, or to a degree, not adequately considered by the Sentencing Commission in formulating the guidelines. 18 U.S.C. § 3553(b)." The circuit court discussed several available departure factors which could be considered. "We have not ruled out the possibility of a departure based on a single act of aberrant behavior. United States v. Simpson, 7 F.3d 813, 820 (8th Cir. 1993)." The court also noted that family ties and employment record, while not ordinarily relevant, may be considered in extraordinary circumstances. The court further advised that the district court could consider the government's conduct, and the "totality of individual circumstances" which may create "the unusual situation not contemplated by the Commission."

United States v. Weise, 89 F.3d 502 (8th Cir. 1996). The district court erred in granting a downward departure to the defendant under USSG §5K2.0. The defendant, who lives on the Red Lake Reservation, was convicted of second degree murder for stabbing an individual after a night of drinking. The district court departed downward based on the difficult Reservation conditions, the defendant's consistent employment record and unique family ties and responsibilities. The district court also determined that a departure was warranted based on the fact that the conduct was a single

act of aberrant behavior. The circuit court reviewed this decision under the abuse of discretion standard. The circuit court stated that departures based on trying conditions on a Reservation were not authorized if the defendant does not demonstrate that he himself had struggled under difficult conditions. *See* United States v. Haversat, 22 F.3d 790, 795 (8th Cir. 1994); United States v. One Star, 9 F.3d 60, 61 (8th Cir. 1993). In short, merely living on a reservation where conditions are difficult for some is not dispositive. The circuit court found that the defendant did not demonstrate personal difficulties on the reservation, and that the pre-sentence report showed a good family upbringing and no evidence of physical or sexual abuse. Finding that it could not determine what made the defendant's case different from the typical case, the circuit court remanded for a "refined assessment" of the issue. On the issue of departure based on aberrant behavior, the circuit court stated that aberrant behavior is more than being out of character and contemplates an action that is "spontaneous and seemingly thoughtless." United States v. Garlich, 951 F.2d 161, 164 (8th Cir. 1991). Noting that the defendant, unprovoked, went and got a knife from across the room and returned to stab the victim, the circuit court found that the conduct was not a single act of aberrant behavior.

**§5K2.3** Extreme Psychological Injury (Policy Statement)

*See* United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998), §1B1.2, p. 1.

United States v. Yellow, 18 F.3d 1438 (8th Cir. 1994). The district court did not err in departing upward for extreme psychological injury where the defendant was convicted of raping his younger brother, who suffers from cerebral palsy, and younger sister. The circuit court held that the district court was entitled to rely upon a psychologist's professional opinion regarding the severity and likely duration of psychological harm suffered, and that the district court's 72-month upward departure was reasonable for the severe psychological injury the defendant inflicted on his victims.

**§5K2.8** Extreme Conduct (Policy Statement)

United States v. Clark, 45 F.3d 1247 (8th Cir. 1995). The district court did not err in imposing a 24-month upward departure for extreme conduct based on its finding that the defendant degraded and terrorized his victim during the commission of a carjacking. In particular, the defendant had stuck a gun to the victim's head, traveled around with the victim still in the car, robbed him, and repeatedly told him that he was going to die. In the district court's evaluation, the defendant terrorized, abused and debased the victim, conduct sufficiently unusual to warrant an upward departure. The defendant argued that the factors on which the district court relied—abduction of the victim and use of a firearm—had already been taken into account in the carjacking and firearms guidelines under which he was sentenced. The circuit court agreed that these factors had already been into account, but cited §5K2.0 and United States v. Joshua, 40 F.3d 948, 951-52 (8th Cir. 1994), in concluding that the upward departure was still justified because these factors were present to a degree substantially in excess of that which is ordinarily involved in the offense. Additionally, the fact that the victim was not physically harmed did not preclude a §5K2.8 upward departure—criminal conduct that does not cause physical harm may nonetheless be "unusually heinous, cruel, brutal or degrading to the victim" such that an upward departure is warranted. *See* United States v. Perkins, 929 F.2d 436 (8th Cir. 1991).

*See* United States v. Johnson, 144 F.3d 1149 (8th Cir. 1998), §1B1.2, p. 1.

**§5K2.13** Diminished Capacity

United States v. Premachandra, 32 F.3d 346 (8th Cir. 1994). The district court correctly determined, by considering the facts and circumstances of the robbery for which the defendant was convicted, that the defendant's offense was not a "nonviolent offense," pursuant to §5K2.13. The court declined to address the government's request to define "nonviolent offense" by referring to §4B1.2(1)(I), which defines nonviolent offense as one that does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." The court further found that the actions taken by the appellant, specifically, wearing a facial disguise, covering the rear license place of the getaway vehicle and entering the bank with an empty briefcase, were inconsistent with a "single act of aberrant behavior."

## CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

### Part B Plea Agreements

**§6B1.2** Standards for Acceptance of Plea Agreements (Policy Statement)

Morris v. United States, 73 F.3d 216 (8th Cir. 1996). The district court did not err in allowing the government to cross-examine a clinical psychologist at the sentencing hearing. The defendant set her unfaithful husband's bed on fire on a military reservation, and pleaded guilty to assault with intent to do bodily injury, 18 U.S.C. § 113(c). The plea agreement bound the government to take no position on a defense motion for a downward departure on the ground that the act was a single act of aberrant behavior. At the sentencing hearing, the defense called a clinical psychologist to testify about domestic violence. When the testimony began to develop additional expert testimony about spousal abuse, the government examined the witness to try to narrow the source of domestic turbulence to the incident of marital infidelity. The defendant argued that the government violated the plea agreement by "taking a position." In an issue of first impression in the Eighth Circuit, the appellate court addressed the "boundaries of `taking a position' on departures from guideline sentences." The court noted that the control of cross- examination during a sentencing hearing "must be guided by specific facts and argument in each case." The court stated that there is no "black letter list of permitted and not permitted questions" at a sentencing hearing. The court in refusing to establish a black letter rule, held ". . . only that in this case where the witness began to shift the focus of the grounds for a downward departure from the agreed fact that marital infidelity had precipitated the offense, to a larger collection of grievances based upon spousal abuse, the prosecutor had the right to employ reasonable cross- examination to bring the inquiry back to the agreed facts."

## CHAPTER SEVEN: *Violations of Probation and Supervised Release*

### Part B Probation and Supervised Release Violations

United States v. Hartman, 57 F.3d 670 (8th Cir. 1995). The district court did not err in imposing an additional term of supervised release after a term of imprisonment following revocation of the defendant's initial term of supervised release. Following revocation of his initial term of supervised release, the defendant was sentenced to nine months imprisonment and 27 months supervised release. On appeal, the defendant acknowledged that the circuit court has repeatedly held that a revocation sentence imposed under 18 U.S.C. § 3583(e) may include imprisonment and supervised release. *See, e.g.*, United States v. Love, 19 F.3d 415, 416 (8th Cir.), *cert. denied*, 115 S. Ct. 434 (1994); United States v. Schrader, 973 F.3d 623, 625 (8th Cir. 1992). The circuit court noted that it could not overrule another panel's decision and that it had consistently declined to reconsider Schrader *en banc*. The circuit court rejected the defendant's argument that the express language in 18 U.S.C. § 3583(h) allowing courts to impose a revocation sentence consisting of both imprisonment and supervised release, indicates that the circuit court had previously misinterpreted 18 U.S.C. § 3583(e) which lacked such express language. The court noted that the legislative history of § 3583(h) indicates that the new legislation was intended to confirm the court's interpretation of the prior law.

United States v. St. John, 92 F.3d 761 (8th Cir. 1996). The appellate court affirmed the district court's decision to impose a revocation sentence that included both a term of imprisonment and a term of supervised release pursuant to 18 U.S.C. § 3583(h). Upon revocation of supervised release, the defendant was sentenced to 14 months imprisonment to be followed by 22 months supervised release, totaling 36 months, the length of his original term of supervised release. The defendant, relying on the Ninth Circuit's construction of the statute, argued that at the time he was sentenced, 18 U.S.C. § 3583(e)(3) had been interpreted as not authorizing supervised release upon revocation of supervised release. Additionally, the defendant argued that section 3583(h), which increases the penalty for the offenses, was enacted subsequent to his conviction. The appellate court rejected the defendant's arguments, and held that the ex post facto clause did not apply to judicial constructions of statutes. Additionally, because the availability of supervised release under 18 U.S.C. § 3583(h) did not increase the penalty authorized under 18 U.S.C. § 3583(e)(3), there was no ex post facto violation.

United States v. Stephens, 65 F.3d 738 (8th Cir. 1995). The district court did not err in applying the mandatory revocation requirement of 18 U.S.C. § 3583(g)(3). The defendant appealed the district court's revocation of his supervised release, arguing that the court erred by considering his need for medical treatment for AIDS in deciding to revoke supervised release. The circuit court concluded that it was immaterial that the district court took the defendant's need for medical treatment into account when it ordered revocation of his supervised release. The circuit court stated that this case was controlled by 18 U.S.C. § 3583(g), providing in part: "If the defendant . . . (3) refuses to comply with drug testing imposed as a condition of supervised release . . . the court shall revoke the term of supervised release." The circuit court held that the defendant's failure to comply with the drug testing conditions imposed by the district court was a knowing and willful violation, and therefore he was subject to the mandatory revocation requirement of 18 U.S.C. § 3583(g)(3).

United States v. Wilson, 37 F.3d 1342 (8th Cir. 1994). The defendant was sentenced to 30 months imprisonment and 4 years of supervised release upon his plea of guilty to conspiring to possess and distribute marijuana. While on supervised release, he admitted that he had used marijuana, violating a condition of his supervised release. His supervised release was revoked pursuant to 18 U.S.C. § 3583(e)(3), and he was sentenced to 16 months imprisonment and an additional term of supervised release equal to "the remainder of term upon completion of 16-month incarceration period." The defendant appealed his revocation sentence, and urged the court to reconsider its decision in United States v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992), which permits a district court to "require the offender to serve a portion of the time remaining on the term of supervised release in prison and the remaining time on supervised release." The appellate court noted that it had no authority to overrule a prior panel decision, and that the court had declined on numerous occasions to reconsider Schrader *en banc*. In any event, the appellate court noted that the remaining time on the original supervised release term would expire some six or seven months after the defendant served the 16 months imprisonment, so that his total revocation sentence would not exceed two years. This is well within the three-year limit on imprisonment set by 18 U.S.C. § 3583(e)(3), and the sentence was affirmed.

**§7B1.4** Term of Imprisonment (Policy Statement)

United States v. Hartman, 57 F.3d 670 (8th Cir. 1995). The district court did not err in imposing an additional term of supervised release after a term of imprisonment following revocation of the defendant's initial term of supervised release. Following revocation of his initial term of supervised release, the defendant was sentenced to nine months imprisonment and 27 months supervised release. On appeal, the defendant acknowledged that the circuit court has repeatedly held that a revocation sentence imposed under 18 U.S.C. § 3583(e) may include imprisonment and supervised release. *See, e.g.*, United States v. Love, 19 F.3d 415, 416 (8th Cir.), *cert. denied*, 115 S. Ct. 434 (1994); United States v. Schrader, 973 F.3d 623, 625 (8th Cir. 1992). The circuit court noted that it could not overrule another panel's decision and that it had consistently declined to reconsider Schrader *en banc*. The circuit court rejected the defendant's argument that the express language in 18 U.S.C. § 3583(h) allowing courts to impose a revocation sentence consisting of both imprisonment and supervised release, indicates that the circuit court had previously misinterpreted 18 U.S.C. § 3583(e) which lacked such express language. The court noted that the legislative history of § 3583(h) indicates that the new legislation was intended to confirm the court's interpretation of the prior law.

United States v. Hensley, 36 F.3d 39 (8th Cir. 1994). After concluding that the defendant violated the conditions of his supervised release, the district court imposed a two-year sentence. The defendant argued this sentence was improper because it is inconsistent with the policy statements in Chapter 7, which, he argued are binding on the courts. The Supreme Court in Stinson v. United States, 113 S. Ct. 1913 (1993), held that Guidelines Manual policy statements interpreting sentencing guidelines are binding on federal courts. The Seventh Circuit has interpreted Stinson's holding to include Chapter 7 policy statements; however, this circuit continues to hold the opposite. Chapter 7 policy statements are not binding on the federal courts because only policy statements that interpret or explain a guideline are binding; Chapter 7 policy statements have no accompanying guidelines thus they do not explain or interpret any particular guideline. Because Chapter 7 policy

statements are not binding the United States Code controls the maximum sentence. However the Code does require the court to consider "any pertinent policy statement . . . in effect on the date the defendant is sentenced." "[O]n the date the defendant is sentenced" refers to the date he was sentenced for violation of his supervised release, not the date he was originally sentenced for the underlying offense. Therefore, this case was remanded because it was unclear whether the sentencing court considered the Chapter 7 policy statements.

United States v. Kaniss, No. 98-1012, 1998 WL 459939 (8th Cir. Aug. 10, 1998). The district court did not abuse its discretion sentencing the defendant to a longer prison term upon revocation of supervised release than that suggested by the guidelines. The defendant had repeatedly violated a condition of his release by using marijuana. His first sentence had been lenient, and he had failed to avail himself to substance abuse programs.

## APPLICABLE GUIDELINES/EX POST FACTO

United States v. Behler, 14 F.3d 1264 (8th Cir.), *cert. denied*, 513 U.S. 960 (1994). The district court erred in sentencing the defendant pursuant to the guidelines in effect at the time of sentencing instead of the version in effect at the time he committed the offense. The defendant argued that his sentence for methamphetamine distribution violated the ex post facto clause because the method used to determine the quantity of methamphetamine imposed harsher penalties than the method in effect at the time the defendant committed his offense. Under the 1987 version, the quantity of methamphetamine was determined by the weight of the entire mixture or substance containing the methamphetamine. Under the 1992 version, the quantity of methamphetamine is determined by either the actual weight of the drug contained in the mixture or substance or by the weight of the entire mixture or substance containing the methamphetamine. The guidelines then require that the court use the quantity that results in the higher offense level. The district court used the actual weight which produced a base offense level that was four levels higher than what would have been imposed under the 1987 version of the guidelines. Thus, the Eighth Circuit remanded with instructions to resentence the defendant according to the guidelines in effect at the time he committed the offense.

*See* United States v. Comstock, No. 97-4399, 1998 WL 557103 (8th Cir. Sept. 3, 1998), §5G1.3, p. 19.

## CONSTITUTIONAL CHALLENGES

### Fifth Amendment—Double Jeopardy

United States v. Weaselhead, No. 97-4397, 1998 WL 569028 (8th Cir. Sept. 9, 1998). The defendant's federal indictment for engaging in a sexual act with an Indian female juvenile violated double jeopardy, where defendant had been convicted and sentenced in tribal court on the same conduct. The court of appeals noted that the defendant was an enrolled member of the Blackfeet Indian Tribe of Montana and had been prosecuted by the Winnebago Tribe in Nebraska for acts

occurring on Winnebago tribal lands. The doctrine of dual sovereignty permits successive prosecutions by independent sovereigns based upon the same conduct. Because each sovereign derives its power from a different constitutional source, both may prosecute and punish the same individual for the same act without implicating the double jeopardy clause's prohibition against successive prosecutions for the same acts. An Indian tribe's criminal jurisdiction over its own members emanates from its inherent sovereign powers. However, the sovereignty retained by the tribes does not include the power of criminal jurisdiction over nonmember Indians. This jurisdiction was granted by Congress in an amendment to the Indian Civil Rights Act. Because the power of the Winnebago Tribe to punish nonmember Indians emanates from Congressionally delegated authority, the tribal court that convicted this defendant and the federal court that indicted the defendant for the same conduct draw their authority from the same source of power. The dual sovereignty limitation on the constitutional protection from double jeopardy is therefore inapplicable, and the double jeopardy clause bars federal prosecution of the defendant for the same conduct that provided the factual basis for the tribal court conviction.

**Sixth Amendment**

United States v. Hughes, 16 F.3d 949 (8th Cir.), *cert. denied*, 513 U.S. 897 (1994). The defendant pleaded guilty to using a firearm in drug trafficking and was sentenced to the statutorily mandated five-year prison sentence. He appealed his sentence claiming he constructively lacked counsel at his sentencing hearing thereby violating his Sixth Amendment right to counsel. The circuit court affirmed his sentence, finding that the defendant's counsel did not ask to be withdrawn until after the sentencing and the defendant made no request for alternative counsel prior to that. *Cf.* United States v. Mateo, 950 F.2d 44 (1st Cir. 1991). Defense counsel's role at sentencing was necessarily limited because of the mandatory minimum sentence involved.

## FEDERAL RULES OF CRIMINAL PROCEDURE

### Rule 11

United States v. Osment, 13 F.3d 1240 (8th Cir. 1994). The court reversed and vacated the defendant's guilty plea because the district court failed to advise him of the mandatory supervised release term to which he was subject. The defendant argued that the consequences of a revocation of supervised release should be considered as part of the "maximum possible penalty" for purposes of complying with Rule 11(c)(1). The court concluded that the plain language of the rule mandates that the district court tell the defendant not only of the applicability of a term of supervised release, but also of the term's effect. Failure to do so constitutes error and renders the plea defective. Whether the error is considered harmless is relative to the advice provided. Since the defendant's maximum possible penalty (approximately 75 months imprisonment) exceeded the 60-month statutory penalty of which he was advised, the district's court's failure to apprise the defendant of the mandatory supervised release term was not harmless error.

### Rule 32

United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997). The district court's failure to provide the defendant an opportunity for allocution prior to imposing sentence in the defendant's supervised release revocation proceeding was not harmless error. The sentence was vacated and remanded for resentencing. The right of allocution derives from Rule 32(c)(3)(C) of the Federal Rules of Criminal Procedure. Even though the defense counsel was given an opportunity to argue against an upward departure, the appellate court held that failure to provide the defendant an opportunity to address the court personally before sentencing was not harmless error.

## OTHER STATUTORY CONSIDERATIONS

### 18 U.S.C. § 924

United States v. Bradshaw, No. 97-3048, 1998 WL 498566 (8th Cir. Aug. 20, 1998). The district court properly dismissed Bradshaw's motion to vacate his prior conviction under 18 U.S.C. § 924(c). The trial court had defined “use” and “carry” interchangeably in its instructions to the jury. Although the definition was erroneous under Bailey v. United States, 516 U.S. 137, 143 (1995), it was consistent with the Supreme Court's pronouncements regarding the “carry” prong in Muscarello v. United States, 118 S. Ct. 1911 (1998). Because the evidence supported Bradshaw's conviction for having “carried” a firearm as Muscarello defined it, he was not prejudiced by the instructional error on “use.”

*See* United States v. Schaffer, 110 F.3d 530 (8th Cir. 1997), 18 U.S.C. § 3553(e).

**18 U.S.C. § 3553(e)**

United States v. Schaffer, 110 F.3d 530 (8th Cir. 1997). In addressing a question of first impression in the circuit, the appellate court agreed with the Eleventh Circuit's decision in United States v. Aponte, 36 F.3d 1050, 1052 (11th Cir. 1994), that 18 U.S.C. § 924(c)'s mandatory minimum sentence of 60 months is the proper departure point for a downward departure granted under an 18 U.S.C. § 3553(e) motion based on substantial assistance. The appellate court rejected the defense argument that, because there is no specific base offense level for a section 924(c)(1) conviction, section 2X5.1 of the guidelines instructs the court to apply the most analogous offense guideline. The defense unsuccessfully argued that the two-level enhancement for possession of a firearm, a specific offense characteristic of a drug trafficking crime at guideline §2D1.1(b)(1) was the most analogous guideline to "using or carrying a firearm during or in relation to a drug trafficking crime."

**18 U.S.C. § 3583**

United States v. Engelhorn, 122 F.3d 508 (8th Cir. 1997). In addressing an issue of first impression in the circuit, the court held that "although the term of incarceration imposed upon a defendant convicted under the ACA [Assimilated Crimes Act, 18 U.S.C. § 13] may not exceed that provided by state substantive law, the total sentence imposed—consisting of a term of incarceration followed by a period of supervised release—may exceed the maximum term of incarceration provided for by state law." In so holding, the court cited with approval the Fourth Circuit's opinion in United States v. Pierce, 75 F.3d 173 (4th Cir. 1996). The appellate court noted that under the South Dakota law assimilated in this case, a period of probation involving government supervision can follow a term of incarceration, and it "serves society's goal of rehabilitation." Thus, the sentence imposed by the federal district court—a term of incarceration plus a term of supervised release "—was similar to a punishment the defendant could have faced in a state court. In this case, therefore, supervised release is a `like punishment' for ACA purposes."

United States v. Watkins, 14 F.3d 414 (8th Cir. 1994). The district court's imposition of a term of supervised release did not violate the five-year statutory maximum under 18 U.S.C. § 924(c). The defendant relied on United States v. Allison, 953 F.2d 870 (5th Cir.), *cert. denied*, 113 S. Ct. 2319 (1992), to support his argument that the supervised release was wrongly imposed because 18 U.S.C. § 924(c) does not provide for it. The court of appeals examined the language of 18 U.S.C. § 3583(a) which empowers the sentencing court to assess a term of supervised release "as part of the sentence. . . ." This language, as opposed to language providing "as part of the incarceration," indicates that a term of supervised release may be imposed in addition to any term of incarceration. Further, the court of appeals relied on the Fifth Circuit's subsequent order in Allison which recognized that although §924(c) does not explicitly mention supervised release, 18 U.S.C. § 3583 expressly authorizes it. *See* United States v. Allison, 986 F.2d 896, 897 (5th Cir. 1992) (order).

**21 U.S.C. § 841**

*See* United States v. Bongiorno, 139 F.3d 640 (8th Cir. 1998), §5D1.2, p. 18.

*See* United States v. Johnson, 28 F.3d 1487 (8th Cir. 1994), *cert. denied*, 513 U.S. 1195 (1995), §2D1.1, p. 6.

United States v. Ortega, No. 97-2012, 1998 WL 436851 (8th Cir. Aug. 4, 1998). The district court did not err in counting the defendant's prior suspended imposition of sentence as a prior conviction for purposes of the life sentence enhancement for prior drug felony convictions. The defendant argued that the prior state court case did not result in a conviction under state law—he was required to serve three years of supervised probation but also received a suspended imposition of sentence. The court of appeals rejected this argument, concluding that the determination when the conviction is final is to be made under federal law. Although the defendant had since moved to withdraw his guilty plea in the state court, the court of appeals would consider the conviction final until such time as the state granted the defendant's motion to withdraw. The suspended imposition is a prior felony conviction which has become final for purposes of 21 U.S.C. § 841(b). If the defendant's motion to withdraw his guilty plea is successful, he would attack any federal sentence, if it is enhanced due to the prior conviction, under 28 U.S.C. § 2255.

**21 U.S.C. § 841(b)(1)**

United States v. Warren, 149 F.3d 825 (8th Cir. 1998). The defendant argued that, because of a typographical error in the statute at the time of his offense, he should have been sentenced to a five-year, instead of a ten-year, mandatory minimum sentence at that time, the same amount of a quantity of a mixture containing methamphetamine—100 grams—was listed as triggering both the five-year and ten-year sentences. The necessary quantity for the ten-year penalty was intended to be 1,000 grams, and the statute was later amended. The court of appeals held that, although penal laws are strictly construed, they should not be construed so as to defeat the obvious intent of the statute. The defendant had fair warning that he faced at least ten years incarceration.